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In the Supreme Court of the United States

OCTOBER TERM, 1958

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The oral opinion of the District Court (R. 41–51) is not reported. The Court of Appeals affirmed the judgment of the District Court without written opinion (Pet. 15).

JURISDICTION

The judgment of the Court of Appeals (Pet. 15) was entered on March 27, 1959. By order of Mr. Justice Whittaker, the time for filing a petition for a writ of certiorari was extended to May 26, 1959. The petition was filed on May 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the trial court properly denied without a hearing a motion for a new trial on the basis of past misrepresentations and alleged misrepresentations by a government witness concerning details of his personal history, none of which was material to the issues of the trial.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure is set forth at page 3 of the Petition.

STATEMENT

The petitioner had been convicted of filing false non-Communist affidavits with the National Labor Relations Board, in violation of 18 U.S.C. 1001 and Section 9(h) of the National Labor Relations Act (29 U.S.C. 159(h)).[1]

At the petitioner's trial—his second under the same indictment[2]—one Fred Gardner, whose testimony is the subject of the motion for a new trial, appeared as one of three government witnesses and testified on direct examination concerning two conversations he had had with petitioner in 1951 and

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[1] The petitioner was convicted on four counts of a six-count indictment, and was sentenced to a total of eight years' imprisonment and $4,000 in fines (R. 10–11). An appeal from this conviction is now pending in the Court of Appeals for the Tenth Circuit.

[2] A prior conviction on the same four counts was reversed and a new trial ordered because of error in permitting an improper question to be put to a character witness on cross-examination (*Travis* v. *United States*, 247 F. 2d 130 (C.A. 10)).

1953 (R. 2, 23–24, 37).[3] He testified that, in a conversation with the petitioner in the fall of 1951, the latter confided to him that his formal resignation from the Communist Party in 1949 was not an actual resignation and that he (petitioner) was still a member of the Communist Party. The substance of the second conversation, had in June 1953, tended to prove that the petitioner was still a member of the Communist Party at that time.[4] The significance of Mr. Gardner's testimony to the trial issues lay in the fact that it tended to prove that the petitioner's pre-1949 membership in the Party—which was undisputed—was not terminated by his public statement in 1949 stating that he had "resigned", but continued, uninterrupted, beyond that date to and beyond the dates of both the affidavits in issue (see footnote 4). One of the two other government witnesses similarly testified to conversations with the petitioner which tended to prove that the petitioner was still a member of the Party in 1952 and 1953—between and after the affidavit dates. No evidence was offered by the petitioner at either of his two trials contradicting the Government's proof that he was a Party member at the time he signed the two affidavits (R. 28).

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[3] Mr. Gardner was a former member of the Communist Party and a former international representative of the union of which the petitioner was an officer—the International Union of Mine, Mill and Smelter Workers. He did not appear as a witness at petitioner's first trial.

[4] The allegedly false affidavits, two in number, on which the charges of the indictment were based, were filed in December 1951 and December 1952, respectively (R. 10–11).

A few days before Mr. Gardner testified against the petitioner, he had appeared as a government witness in *United States* v. *West, et al.*, a prosecution in the United States District Court for the Northern District of Ohio, for conspiracy to file false non-Communist affidavits, in violation of 18 U.S.C. 371 (R. 2). Mr. Gardner's testimony on direct examination in the *West* case concerned other experiences he had had in the Communist Party, relating to the defendants in that case. On cross-examination in the *West* case, Mr. Gardner was asked whether he had ever been in the armed forces and he answered "No" (R. 3, 29). As a result of information received by one of the attorneys for the defense in the *West* case, indicating that this testimony by Mr. Gardner concerning his military service history was untruthful or inaccurate, the attorneys for the defendants therein communicated with the Department of Justice requesting that it investigate the matter (R. 3). See *United States* v. *West,* 170 F. Supp. 200, 206–207 (N.D. Ohio). They were advised in a letter dated October 8, 1958, from the Acting Assistant Attorney General, Internal Security Division, that, upon investigation, Army service records revealed that Mr. Gardner served in the Army from January 25, 1922, to May 30, 1925; that he was absent without leave for a short time during this period, as a result of which he had been tried by court-martial and sentenced to two months' confinement at hard labor and to forfeit $20.00 per month in salary for that period; and that he had re-enlisted in the Army on January 21, 1926, and

was assigned to Fort Riley, Kansas, but deserted from there on May 11, 1926, and never returned (R. 3). The Army records further reflected, the letter stated, that Mr. Gardner had given December 13, 1903, as his date of birth,[5] and that he was not, at the time of the inquiry, wanted by the Army as a deserter (*ibid.*). See also *United States* v. *West, supra,* 170 F. Supp. at 205. Thereafter, on October 16, 1958, the *West* defendants moved under Rule 33, F.R. Crim. P., for a new trial, relying on this newly discovered evidence (R. 3). After a full hearing, lasting three and one-half days, in which witnesses were examined under oath and documents received in evidence, the motion was denied. *United States* v. *West, supra.* An appeal from the denial of the motion in that case is presently pending before the Court of Appeals for the Sixth Circuit.

The petitioner's motion for a new trial in this case (R. 2–6) was filed in the District Court on October 17, 1958. The motion, after setting forth *verbatim* the above-mentioned letter from the Acting Assistant Attorney General, Internal Security Division, to defense counsel in the *West* case (R. 3), alleged that this newly discovered evidence indicated that Mr. Gard-

[5] Mr. Gardner testified on cross-examination at the petitioner's trial that he was born in 1906 (R. 3–4). The court in the *West* case, in its opinion denying a motion for a new trial, observed that "The evidence offered at the hearing on the motion was to the effect that Gardner had voluntarily enlisted in the Army on January 25, 1922, at the age of 15 * * *. He accomplished this by misstating his date of birth as December 13, 1903, instead of the true date of birth which was July 13, 1906" (*United States* v. *West*, 170 F. Supp. 200, 205).

ner had given untruthful testimony about his military service record in the *West* case and was inconsistent with his testimony on cross-examination in the instant case as to the date of his birth[6] (R. 3–4). The motion further alleged that the newly discovered evidence indicated that Mr. Gardner had given false information to the FBI, appearing in a statement furnished to the petitioner at the trial pursuant to the provisions of 18 U.S.C. 3500 (the so-called "Jencks" Act), to the effect (a) that he was born on July 13, 1906; (b) that he had had no military service; (c) that he had been employed by the du Pont Chemical Co. at Niagara Falls, N.Y., from 1925 to 1929; and (d) that he had resided at Niagara Falls, N.Y., from 1925 to 1929 (R. 4). The motion recited that these facts established that Mr. Gardner had "committed perjury in the West case," that he "may have committed perjury" in the instant case,[7] and that he had "violated the very statute under which [petitioner] was being tried" by giving false information to the FBI (R. 4).

On October 31, 1958, argument of the motion for a new trial (R. 12–41) was had before Chief Judge

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[6] See footnote 5, *supra*, p. 5.

[7] Mr. Gardner's date of birth was clearly immaterial to any issue presented at his trial in the case at bar or in the *West* case. Moreover, it would appear that the testimony of Mr. Gardner in the instant prosecution which the petitioner says "may have" been perjurious, *i.e.*, that he was born in 1906, was the truth, and that it was the date of birth which he apparently gave the Army when he enlisted in 1922, *viz.*, 1903, which—in order to conceal the fact that he was at that time only 15 years old and so too young to enlist—he misrepresented (see fn. 5, *supra*, p. 5).

Knous, who had presided at the petitioner's trial. In the course of the argument, counsel for the petitioner filed with the court a letter from E. I. du Pont De Nemours & Co., Niagara Falls, N.Y., stating that one Fred Leonard Gardner (the full name of the witness here involved), had worked for the Roessler and Hasslacher Chemical Company, Niagara Falls, from August 12, 1926, to February 16, 1928 (R. 15–16). It appeared from another source that du Pont had taken over this company in 1930 (R. 16). On behalf of the Government, Mr. Donald E. Kelley, United States Attorney for the District of Colorado, filed with the court a statement reciting that none of the attorneys who had prosecuted petitioner's case, nor any other attorneys or agents of the Department of Justice, including the FBI, had had any knowledge of Mr. Gardner's military service at the time of trial or prior to the receipt of information with respect thereto from the Department of the Army under the circumstances related above (*supra*, pp. 4–5) (R. 7, 12–13).

Following argument, Judge Knous rendered an oral opinion denying petitioner's motion (R. 9, 10, 41–49). Judge Knous assumed, for purposes of ruling on the motion, that Mr. Gardner had misrepresented his military service history at the *West* trial, had given erroneous information to the FBI in respect of his past employment and residences, and had made inconsistent statements with regard to the year of his birth (R. 43, 45, 48). He held, however, that, because none of these matters "went to a material issue in the case" and none had "any bearing whatsoever upon the ques-

tion of the guilt or innocence of the defendant" (R. 44), and because the newly discovered evidence relied on was merely "cumulative" and "impeaching" (R. 45), the motion presented no proper basis for the granting of a new trial (R. 43–49).

On appeal, this judgment was affirmed without opinion.

ARGUMENT

We submit that the District Court acted well within the bounds of its permissible discretion in denying the petitioner's motion, and that this case presents no issue warranting review by this Court.

The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling should not be disturbed on appeal in the absence of a showing of a plain abuse of that discretion. See *Weiss* v. *United States*, 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687; *Long* v. *United States*, 139 F. 2d 652 (C.A. 10); *United States* v. *Johnson*, 142 F. 2d 588 (C.A. 7); *United States* v. *On Lee*, 201 F. 2d 722 (C.A. 2); *Winer* v. *United States*, 228 F. 2d 944 (C.A. 6); *Pitts* v. *United States*, 263 F. 2d 808 (C.A. 9). The petitioner, it is submitted, has failed to show any such abuse here.

It is well settled, moreover, as the District Court pointed out (*supra*, R. 45), that a motion for a new trial on the ground of newly discovered evidence which is merely cumulative or impeaching will not ordinarily be granted. *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *Johnson*, *supra*; *Murphy* v. *United States*, 198 F. 2d 87 (C.A.D.C.);

United States v. *On Lee, supra; United States* v. *Rutkin,* 208 F. 2d 647 (C.A. 3); *Pitts* v. *United States, supra.* See also *United States* v. *Johnson,* 327 U.S. 106, 110, n. 4.

The petitioner makes no claim that the new evidence relied upon in support of his motion was not of this character. That evidence consisted exclusively of proof that—to put the matter in the worst light from Mr. Gardner's standpoint—Mr. Gardner had made a number of untruthful statements in the past relating to incidents of his personal history, none of which bore in any way on the issues of the petitioner's trial. The statements, moreover, were in areas totally unrelated to the subject matter of his only material testimony in the case, *i.e.,* his testimony relative to conversations he had had with the petitioner in which the petitioner in effect admitted his continued membership in the Communist Party subsequent to the date of his purported resignation.

Thus, for example, even if it be assumed, *arguendo,* that Mr. Gardner's denial on cross-examination at the *West* trial that he had ever been in the armed forces was an intentional misrepresentation of fact in an attempt to conceal this episode in his life's history,[8]

[8] But see *United States* v. *West, supra,* 170 F. Supp. at 205, where it is pointed out that "Gardner's explanation," in the proceedings on the motion for a new trial in that case, of his negative answer to the question of whether he had ever been in the armed forces "was that he thought that the question propounded to him * * * related to whether he had been in the Armed Forces in World War II" (in which he had, in fact, not served). As we have previously noted, the question of whether or not Mr. Gardner had ever been in the armed forces had no material bearing on the issues of the *West* trial.

it is understandable as having been prompted by the fear that disclosure of the truth about his past military service might lead to prosecution for his military offense. But his willingness to make a misrepresentation of this sort has no direct relevance to his general credibility as a witness in respect of matters (such as those to which his *material* testimony at the trial related) concerning which, so far as appears, he lacked any motive for testifying falsely.

Similarly, the fact that Mr. Gardner appears to have misrepresented his age at the time of his enlistment in the Army in 1922 (to avoid being rejected as too young; see fn. 5, *supra*, p. 5) is hardly of such a type as to render his word unbelievable on any subject, particularly where the motive of self-interest is absent.

The petitioner's reliance on *Mesarosh* v. *United States*, 352 U.S. 1, and *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (Pet. 6–11), is misplaced. *Mesarosh* involved a prosecution witness at a federal trial who, after his testimony in the principal case, commenced to give extravagantly improbable testimony in other cases and proceedings (352 U.S. at 4–8). The statements were in large part *material to the proceedings* in which they were made. Similarly, the *Communist Party* case involved a situation in which allegations had been made of perjury on the part of three witnesses "in other cases on subject matter *substantially like that of their testimony in the present proceedings*" (351 U.S. at 124; emphasis added). Comparison of the alleged perjuries in other cases which were in-

volved in the *Communist Party* case (Record, No. 48, Oct. Term, 1955, pp. 2059–2064) with the types of misrepresentations and alleged misrepresentations on other occasions which are involved in this case reveals their total and material dissimilarity.

The distinction between a showing of untruthful testimony of a witness relating to material issues and untruthful statements which are collateral to the issues has been recognized by the courts. See, *e.g.*, *Casey* v. *United States*, 20 F. 2d. 752, 754 (C.A. 9), affirmed, 276 U.S. 413; *United States* v. *West*, *supra*, 170 F. Supp. 200, 211. It is, we submit, a fair and reasonable one. In any event, the District Court did not abuse its discretion in denying the petitioner's motion for a new trial in the light of the nature of the statements relied upon as newly discovered evidence.

Since, for the reasons stated, the allegations of the motion for a new trial were, even if fully established, insufficient to warrant the granting of a new trial, there was no error, contrary to the petitioner's related contention (Pet. 10–11), in refusing to grant a hearing for the presentation of evidence. See R. 48–49.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

As noted by the petitioner (Pet. 12), we do not oppose his suggestion that the Court defer action on the petition pending decision by the Court of Appeals on the petitioner's appeal from the conviction out of which the instant proceedings arose. A

decision adverse to the Government on that appeal would, if not reversed, render this proceeding moot.

We likewise do not oppose the petitioner's further suggestion that disposition of the petition be deferred pending decision by the District Court on the petitioner's second motion for a new trial, based on "newly discovered evidence contained in Gardner's testimony on the hearing on the motion for a new trial in the *West* case" (Pet. 12), since a decision on that motion adverse to the Government would (unless reversed) likewise render this proceeding moot.

We oppose, however, the petitioner's suggestion that disposition of the present petition be deferred pending decision by the Court of Appeals for the Sixth Circuit of the appeals by the *West* defendants from the denial of their motions for a new trial.

Respectfully submitted.

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